No. 18-2705

In The

United States Court of Appeals for the Eighth Circuit

CASEY VOIGT and JULIE VOIGT,
Plaintiffs-Appellants,

v.

COYOTE CREEK MINING COMPANY, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the District of North Dakota,
No. 1:15-cv-00109-CSM (Hon. Charles S. Miller, Jr.)

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Coyote Creek Mining Company ("CCMC") applied to the North Dakota Department of Health ("NDDOH") for a permit to construct a coal mine (the "Mine") that included a coal storage pile next to a coal processing facility. After careful review, NDDOH determined that CCMC's coal pile is not in the coal processing facility and thus is not regulated by the new source performance standards ("NSPS") for coal processing facilities (Subpart Y). NDDOH issued CCMC a minor source permit because the Mine's potential to emit ("PTE") particulate matter ("PM") fell below the 250 tons per year ("tpy") threshold that would have required a major source permit.

Plaintiffs-Appellants Casey and Julie Voigt own a ranch on land that they and other family members lease to CCMC for its coal mine. The Voigts filed this lawsuit alleging that CCMC failed: (1) to obtain a required major source permit; and (2) to implement a fugitive dust control plan required by Subpart Y. The district court granted CCMC's motion for summary judgment, finding that CCMC's coal pile is not subject to Subpart Y and that emissions from it do not count toward the 250 tpy threshold. The court's determination was correct.

CCMC believes that oral argument is unnecessary because it is clear that the determination by NDDOH should not be disturbed. But if this Court wishes to hear argument, 15 minutes per side should be sufficient.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eighth Circuit Local Rule 26.1A, Coyote Creek Mining Company, LLC submits this corporate disclosure.

Coyote Creek Mining Company, LLC, is a Nevada limited liability company. Its sole member (owner) is The North American Coal Corporation. The North American Coal Corporation is one hundred percent owned by NACCO Industries, Inc., a publicly-traded company.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of North Dakota had jurisdiction pursuant to 28 U.S.C. § 1331, and 42 U.S.C. § 7604(a)(1) and (a)(3). The district court entered final judgment on July 10, 2018. On July 31, 2018, the Voigts timely filed a Notice of Appeal within thirty days of the final judgment and order disposing of all relevant issues in this case.

This is an appeal from the district court's final order disposing of all the Voigts' claims against CCMC. Therefore, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether a determination made by NDDOH pursuant to authority expressly delegated to it by EPA on the applicability of the Clean Air Act's NSPS should receive deference in a subsequent citizen suit against a source that was constructed based on that determination.

Statutes:

- 42 U.S.C. § 7401(a)(3)
- 42 U.S.C. § 7411(c)

Cases:

- *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004)
- *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1020 (8th Cir. 2010)
- *Nucor Steel-Ark. v. Big River Steel, LLC*, 825 F.3d 444 (8th Cir. 2016)
- *Grand Canyon Trust v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173 (D. Utah 2017)

Federal Register & Other EPA Guidance:

- *Clean Air Act Approval and Promulgation of Air Quality Implementation Plan Revision for North Dakota*, 73 Fed. Reg. 30308 (May 27, 2008)
- *US EPA Region 8 Delegation Summary, 40 CFR Part 60 – New Source Performance Standards* (May 19, 2017)

II. Whether NDDOH's determination that Coyote Creek Mine's coal pile is not subject to 40 C.F.R. pt. 60, Subpart Y, and that the Mine thus was not required to obtain a major source air permit, should be sustained because it rests on a reasonable interpretation of the relevant EPA rules and guidance.

Statutes:

- 42 U.S.C. § 7475(a)

Cases:

- *Star Enterprise v. U.S. EPA*, 235 F.3d 139 (3d Cir. 2000)
- *Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351 (8th Cir. 1998)
- *Nw. Envtl. Defense Ctr. v. Cascade Kelly Holdings LLC*, 155 F. Supp. 3d 1100 (D. Or. 2015)
- *United States v. Minnkota Power Corp., Inc.*, 831 F. Supp. 2d 1109 (D.N.D. 2011)

Regulations:

- 40 C.F.R. pt. 60, Subpart Y (§§ 60.250-60.258)
- N.D. Admin. Code Chapter 33-15-17

Federal Register & Other EPA Guidance:

- *New Source Performance Standards (NSPS)—Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations*, 63 Fed. Reg. 53288 (Oct. 5, 1998)
- *Standards of Performance for Coal Preparation and Processing Plants*, 74 Fed. Reg. 51950 (Oct. 8, 2009)
- EPA, *Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. 60 Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal* (September 2009)
- *E-mail Correspondence from M. Johnson, USEPA to C. Higgins, Office of Management and Budget (OMB), August 26, 2009, Standards of Performance for CPPPs - Final Amendments Powerpoint*

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. CCMC Submits a Permit Application.

In September 2014, CCMC submitted an application to NDDOH for an air quality permit to construct a surface lignite coal mine (the "Permit Application"). JA-32, JA-35 (Permit App.). The Permit Application described the activities that were to occur at the mine face—where the coal is extracted from the ground—and at a coal processing facility located several miles away, connected by a private haul road. JA-36 (Permit App.). It also described an open coal pile approximately 8 acres in size, with a capacity of approximately 180,000 tons, and noted that this pile, located outside the coal processing facility, would only store raw, unprocessed coal. *Id.*

The Permit Application explained that coal would be pushed by bulldozer from the pile into the coal processing facility's "receiving pocket and apron feeder," where it would then be conveyed to primary and secondary crushing equipment. *Id.* The crushing would take place within an enclosure, referred to in the Permit Application as a passive enclosure containment system ("PECS"). *Id.* After crushing, the coal would be transferred to a conveyor belt for distribution. *Id.* Only 750 feet of the conveyor is on property controlled by CCMC, and the conveyor has three-quarter (3/4) enclosed hoods which were designed to protect coal from wind. JA-417 (Steffen Decl. ¶¶ 26-28).

The Permit Application identified the portion of the facility beginning with the apron feeder as a "coal preparation and processing plant" ("CPPP") regulated by 40 C.F.R. pt. 60, Subpart Y (§§ 60.250-60.258) ("Subpart Y"), because it "prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying." JA-43 (Permit App.); *see also* 40 C.F.R. § 60.251(e). It explained that "the open storage pile" and the "[unloading of] raw lignite to the open storage pile" is not subject to Subpart Y. JA-36-37, JA-44 (Permit App.).

B. NDDOH Performs An Air Quality Effects Analysis and Issues a Permit to Construct.

NDDOH reviewed CCMC's Permit Application, and prepared an Air Quality Effects Analysis ("AQEA") in connection with its review. Among other things, the AQEA reflects NDDOH's determinations that (1) only the coal processing equipment ("FUG-1"), and not the coal pile, is regulated by Subpart Y, and (2) the Mine did not require a major source permit under the Prevention of Significant Deterioration ("PSD") program because its potential to emit fugitive PM emissions was below 250 tpy. JA-623-24, JA-626 (AQEA).

In the AQEA, NDDOH specifically included the coal pile, referred to as the "open coal storage pile," in a list of operations and facilities, designated "FUG-2," that are not subject to Subpart Y. JA-623-24 (AQEA). NDDOH evaluated the PTE from FUG-1 and FUG-2 separately. It found the PTE from FUG-1 to be

"negligible." JA-625 (AQEA). With respect to FUG-2, NDDOH stated: "[f]acility-wide fugitive emissions are difficult to accurately quantify and are not considered when determining major source applicability." *Id.* NDDOH thus expressly concluded that the PTE for fugitive PM emissions from the coal pile did not count toward the 250 tpy major source threshold, that "emissions of any regulated pollutant from the facility are expected to be well below 250 tons/year," and that therefore "the facility is not classified as a major stationary source." JA-626 (AQEA).

The parties in this case deposed Craig Thorstenson, an NDDOH environmental engineer and the author of the AQEA. JA-540 (Thorstenson Dep. 36:15-37:12). According to Mr. Thorstenson, AQEAs are completed "for every permit" and NDDOH uses them to confirm that the applicant is, or will be, in compliance with all applicable state and federal rules. *Id.* (37:22-38:24). Mr. Thorstenson testified that the AQEA prepared for the Mine was accurate. *Id.* (38:3-8).

In the Permit Application, CCMC stated that emissions from the Subpart Y facility would be "negligible and unquantifiable." JA-44 (Permit App.). As documented in a table of the AQEA, NDDOH agreed. JA-625 (AQEA). Mr. Thorstenson explained that it would be difficult to quantify emissions from the Subpart Y facility because "it's totally enclosed" and the PECS "reduces [emissions] to a negligible level." JA-541-42 (Thorstenson Dep. 42:3-18; 45:17-19).

NDDOH issued CCMC a minor source permit to construct (the "Minor Permit") on January 7, 2015. JA-60 (Minor Permit). The Minor Permit obligates CCMC to control fugitive dust at the Mine by complying with North Dakota Administrative Code Chapter 33-15-17. JA-62 (Minor Permit). The Minor Permit, like the AQEA, describes the Mine as consisting of two potential fugitive emissions units, identified as "FUG-1" and "FUG-2." JA-61 (Minor Permit). It describes FUG-1 again as "coal processing equipment consisting of primary and secondary crushing and conveying[.]" *Id.* It describes FUG-2 as including other sources of fugitive emissions, such as the "[o]pen coal storage pile." *Id.* Mr. Thorstenson testified that "FUG-1" consists of "the equipment that's subject to NSPS Subpart Y," and "FUG-2" consists of "fugitive emissions from units outside of the Subpart Y applicability." JA-538-39 (Thorstenson Dep. 30:25-31:9).

Mr. Thorstenson testified to NDDOH's conclusion that Subpart Y's applicability begins once coal "gets into the apron feeder that's being fed into the crushing equipment[.]" JA-546 (Thorstenson Dep. 60:22-25). He reiterated that a CPPP subject to Subpart Y starts at "the point at which [coal is] fed into the equipment" or "comes into contact with" the apron feeder. JA-556 (Thorstenson Dep. 99:14-100:5). Mr. Thorstenson confirmed NDDOH's determination that the Mine is "not a major source under the [PSD] rules," and therefore CCMC "wouldn't require a PSD permit." JA-535 (Thorstenson Dep. 18:17-20).

According to Mr. Thorstenson, equipment located before or outside of the processing facility would not be subject to Subpart Y. Indeed, he stated that both the "coal haul trucks that dump their coal" on the coal pile and "the dozer that pushes the coal into the hopper" operate "before the NSPS Subpart Y affected emission units." JA-536 (Thorstenson Dep. 22:17-25).

The Voigts' expert in this case, Steven Klafka, agreed with NDDOH that the coal pile is not subject to Subpart Y. In an Affidavit, Mr. Klafka defined the Mine's "coal crushing facility" as including "the mine's primary coal crusher, secondary coal crusher, and associated conveyor belts and coal transfer points," but not the coal pile. JA-75 (Klafka Aff. ¶ 13). When questioned about this during his deposition, Mr. Klafka confirmed that when he used the phrase "coal crushing facility," he was referring to the equipment that is subject to Subpart Y. JA-1484 (Klafka Dep. 37:16-20).

C. NDDOH Determines That CCMC Does Not Require a Subpart Y Fugitive Dust Control Plan.

NDDOH also considered whether CCMC needed to prepare and submit a Subpart Y fugitive dust control plan for the coal pile. Mr. Thorstenson maintains that it did not. JA-549 (Thorstenson Dep. 74:5-12). When asked to explain the basis for NDDOH's position, he stated that the coal pile is "not part of the coal crushing and handling facility," which it must be "in order to be subject to NSPS Subpart Y."

Id. (74:15-16). Instead, the coal pile is "outside of" the CPPP because it is "prior to that unit." *Id.* (74:18-20).

Mr. Thorstenson was also asked in his deposition to discuss an email he sent suggesting that a fugitive dust control plan could be required under Section 60.254(c) of Subpart Y. *See* Aplts. Br. at 17[1] (discussing email). Mr. Thorstenson explained that he changed his position on this topic before issuing the Minor Permit. First, he looked at the issue more "close[ly] and discussed it with people" and then "realized that the NSPS Subpart Y applicability doesn't start until they start crushing and processing the coal." JA-536 (Thorstenson Dep. 22:1-5). Mr. Thorstenson also studied a "response to comments" issued by EPA around 2009 where "they laid out pretty clearly" that "you didn't have to include the coal storage piles that were outside of the Subpart Y facility." JA-555 (Thorstenson Dep. 96:13-97-13). Based on his discussions and review of this EPA guidance, he concluded that the coal pile "was not subject to Subpart Y." JA-536 (Thorstenson Dep. 22:12-16).

Thus, because NDDOH determined that the coal pile is not subject to Subpart Y, the Minor Permit does not include Subpart Y dust requirements for the coal pile. But the Minor Permit does obligate CCMC to control fugitive dust by adhering to requirements in North Dakota Administrative Code Chapter 33-15-17 and

[1] Page citations to the Voigts' Opening Brief ("Aplts. Br.") are to the "Page" number electronically stamped by the CM/ECF system on the bottom of each page.

regulations of the North Dakota Public Service Commission ("NDPSC"), which regulates coal mining in North Dakota. JA-62 (Minor Permit); N.D.A.C. § 69-05.2-09-05. CCMC has prepared a fugitive dust control plan (the "Dust Control Plan") that complies with these requirements. JA-416 (Steffen Decl. ¶¶ 20-22).

D. The Voigts Notify EPA of Their Challenges to the Mine and NDDOH Reaffirms Its Decision to Issue a Minor Source Permit.

On December 9, 2015, after NDDOH issued the Minor Permit, the Voigts' counsel wrote a letter to officials at EPA's Region VIII. The letter argued that CCMC's coal pile was subject to Subpart Y. JA-80-84 (England Letter to EPA). After receiving the letter, several Region VIII officials conducted a conference call with NDDOH. During the call, NDDOH explained its reasoning behind issuing CCMC the Minor Permit. JA-547 (Thorstenson Dep. 63:13-64:3).

After the call, NDDOH sent EPA Region VIII a follow-up letter, and enclosed a copy of EPA's Responses to Comments to Proposed 2009 Amendments, which NDDOH quoted in the letter: "The guidance specifically states that 'The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of Subpart Y.'" *See* JA-79 (NDDOH Letter to EPA). Further, NDDOH reaffirmed its issuance of the Minor Permit, stating that it "expect[s] no air quality issues," and had "not seen any evidence that would indicate that our determination was not complete or correct." *Id.*

EPA did not provide further comments to, or request any action by, NDDOH. JA-547 (Thorstenson Dep. 64:4-7).

E. CCMC Constructs the Coal Processing Facility and Coal Stockpile.

CCMC crushed its first ton of coal from the Mine on May 16, 2016. JA-415 (Steffen Decl ¶ 10). About one month earlier, CCMC had started to amass its coal stockpile. *Id.* (¶ 11). CCMC wanted a stockpile within the range of 130,000 to 145,000 tons, but it took until about August 2016 before the stockpile reached that range. *Id.* (¶¶ 12-13). Since then, CCMC has generally maintained the stockpile within that range, and the amount of coal within the pile has never dropped below 101,000 tons. *Id.* (¶¶ 14-15). It is unlikely that CCMC will ever use the reserve unless there is a long-term emergency that would affect CCMC's ability to mine or deliver coal. JA-415-16 (Steffen Decl. ¶¶ 16-17). If such an emergency occurred, the amount of coal in the base of the pile would allow CCMC to meet its contractual delivery obligations for approximately three weeks. JA-416 (Steffen. Decl. ¶ 18).

During normal operations, "the apron feeder is rarely visible—it is typically covered with coal that is nearly level with the top of the coal pile[.]" *Id.* (¶ 19). Therefore, the apron feeder usually draws coal in with the assistance of gravity, and without direct assistance from a bulldozer. *Id.*; JA-1360 (Raasch Report ¶ 48). In rare circumstances, however, the apron feeder becomes exposed and requires a bulldozer to push coal directly into it. JA-998 (Steffen Decl. ¶ 16); ADD-68.

F. NDDOH Inspects the Mine and Issues a Permit to Operate.

NDDOH conducted an air quality compliance inspection at the Mine on August 4, 2016. JA-671 (Stroh Dep. 23:5-8). The resulting Facility Inspection Report stated that "no visible emissions were observed from the crushing equipment (FUG-1), indicating that the closed system is effective in controlling emissions." JA-465 (Inspection Report). In fact, the Report stated that "[n]o visible emissions … were noted during the mine inspection," and that "no visible dust was observed off the property boundary." JA-466 (Inspection Report). The Report concluded that the Mine was "in compliance with" applicable rules and the Minor Permit, and thus recommended that NDDOH issue "a minor source permit to operate." JA-467 (Inspection Report).

The Facility Inspection Report also reiterated NDDOH's findings from the AQEA, stating again that the "beginning of the coal processing facility subject to NSPS Subpart Y" is "the apron feeder" and that "the pile … is not considered an affected facility under NSPS Subpart Y." JA-496 (Inspection Report).

On November 4, 2016, NDDOH issued a minor source permit to operate the Mine (the "Operating Permit"). JA-500 (Operating Permit). The Operating Permit contains conditions similar to those in the Minor Permit with regard to maintenance of the PECS and control of fugitive dust. JA-501-02 (Operating Permit).

G. Fugitive Emissions Calculations Show That the Mine Is Not a Major Source.

In his expert report, the Voigts' expert Mr. Klafka provides emissions calculations for twelve potential sources of fugitive emissions at the Mine. Adopting NDDOH's conclusion that the Subpart Y facility begins at the apron feeder, or "feeder-breaker" (referred to by Mr. Klafka as the "primary crusher") after the coal pile, the total PTE from the relevant emission source points (identified as steps 7 through 12 of Mr. Klafka's report) is 82.4 tpy, well under the major source threshold of 250 tpy.[2] JA-396 (Klafka Report).

CCMC's designated experts, Joel Trinkle and Clayton Raasch estimated the PTE from corresponding activities at less than 1 tpy. JA-1319 (Trinkle Report ¶ 37); JA-1360, JA-1373-78 (Raasch Rep. ¶ 46 & App. B).

The parties' primary experts thus agree that potential emissions from the CPPP are substantially less than the 250 tpy major source threshold.

II. PROCEDURAL HISTORY

A. The Voigts' Initial Complaint and Motion to Dismiss.

On August 12, 2015, the Voigts filed a Clean Air Act ("CAA") citizen suit in federal district court pursuant to 42 U.S.C. § 7604(a)(3). JA-15 (Compl.). The

[2] Mr. Klafka admitted that the number 15.6 tpy in Step 12 of Table 1 of his report resulted from a calculation error that resulted in the figure being 100 times higher than it should have been. The correct number should have been .156. JA-1570-71 (Klafka Dep. 123:6-124:12).

Complaint raised a single claim for relief and alleged that CCMC had constructed a Major Emitting Facility without first obtaining a major source permit to construct. JA-29-30 (Compl. ¶¶ 65-70). The Voigts sought declaratory and injunctive relief and civil penalties. JA-15-16 (Compl. ¶ 2).

On September 3, 2015, CCMC moved to dismiss the Complaint, arguing that the district court lacked subject matter jurisdiction and that the Complaint failed to state a claim. ECF 7[3] (Mot. to Dismiss). Although the court expressed "substantial doubts" about the Voigts' claims, it denied the motion on July 15, 2016. JA-257 (9/15/16 Order).

B. The Voigts' First Amended Complaint.

Following the district court's denial of the motion to dismiss, the parties stipulated that the Voigts could add a second claim alleging that the coal pile is subject to NSPS Subpart Y and does not have the dust control plan required for facilities subject to Subpart Y. *See* 40 C.F.R. § 60.254(c). The Voigts filed their First Amended Complaint on August 1, 2016. JA-330 (FAC).

C. Motions for Summary Judgment and the Decision Below.

On August 15, 2017, both parties moved for summary judgment and asked the district court to determine whether the coal pile and activities upon it are subject

[3] Record citations that are not included in the Joint Appendix are to the CM/ECF document numbers in Case No. 1:15-cv-00109-CSM (D.N.D.).

to Subpart Y. ECF 83 (CCMC's MSJ); ECF 86-2 (Voigts' MSJ). NDDOH and Lignite Energy Council, an industry trade group, filed briefs *amicus curiae* in support of CCMC before the district court. ECF 92 (Br. of *Amicus Curiae* State of N.D.); ECF 103 (Br. of *Amicus Curiae* Lignite Energy Council).

On July 3, 2018, the district court granted CCMC's motion for summary judgment and denied the Voigts' motion. ADD-1 (Order Granting MSJ). The "primary focus" of the district court's decision was whether the coal pile is "subject to Subpart Y or not." ADD-15. The court acknowledged EPA guidance stating that the beginning of a Subpart Y "coal preparation plant" is where coal is unloaded "into the first hopper 'downstream' from any form of transportation." ADD-41 (quoting EPA, *Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. 60 Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal* at 77-79 (September 2009) (hereinafter, "Response to Comments")); *see also* JA-201-03 (Response to Comments).

The court also noted EPA guidance that if "coal is unloaded for the purpose of storage, then the unloading activity is not an affected facility under NSPS Subpart Y." ADD-35 (quoting *New Source Performance Standards (NSPS)—Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations*, 63 Fed. Reg. 53288, 53289-90 (Oct. 5, 1998) (hereinafter, "1998 EPA

Guidance")). Instead, the coal must be "directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y." *Id.*

The court found that deference is warranted to NDDOH's finding that the coal pile is "not part of the coal processing facilities that are subject to Subpart Y," ADD-73-77, for several reasons:

- NDDOH's finding that the beginning of the coal processing plant is "the point where the process begins to load coal into the hopper-shaped structure surrounding the apron feeder" is "consistent with" EPA guidance. ADD-75.
- The fact that the coal pile contains only "mine-run, unprocessed coal" and provides coal storage that is "more than 'temporary,'" supported NDDOH's conclusion that the coal pile was not subject to Subpart Y under EPA guidance. *Id.*
- The exclusion of CCMC's coal pile in this instance "does not eviscerate the Subpart Y provision that makes clear that open storage piles are 'affected facilities,'" because Subpart Y regulates other coal piles "*within a coal processing facility*[.]" *Id.* (emphasis added).
- A "coal pile would be needed" at the mine even if CCMC "did no coal processing" onsite. ADD-74.

The district court entered final judgment on July 10, 2018. JA-1258 (Judgment). This appeal followed.

SUMMARY OF THE ARGUMENT

The CAA is an exercise in cooperative federalism. Under its framework, states have the primary responsibility for making certain CAA determinations pursuant to authority vested in them by EPA, following approval of their State Implementation Plans ("SIPs"). One of the authorities expressly delegated to states under this cooperative structure is the authority to make NSPS applicability determinations. Another expressly-delegated authority allows states to issue construction and operating permits for major (PSD) and minor sources. This cooperative framework ensures efficient and effective implementation of the CAA nationwide.

Consistent with this model, and pursuant to the authority expressly delegated to it by EPA, NDDOH made a determination about the Mine: CCMC's coal pile is not subject to the NSPS requirements of Subpart Y. Based on that determination, NDDOH issued CCMC a minor source permit for the Mine. The record reflects that NDDOH carefully considered CCMC's Permit Application, conducted an independent analysis, prepared an AQEA, consulted EPA guidance, and concluded that the coal pile is not subject to Subpart Y. *See* ADD-73-77.

Nonetheless, the Voigts filed this lawsuit asking the district court to second guess the reasoned determination of NDDOH. The court below was correct not to disturb NDDOH's decision because deference is owed to a state agency's CAA determinations. And deference is particularly appropriate here, where the record reflects that NDDOH considered and followed key EPA guidance in making its Subpart Y determination. Because NDDOH is the agency to which EPA delegated its authority to make the NSPS determination in question, proper deference alone directs this Court to uphold NDDOH's determination that Subpart Y does not apply to the coal pile.

Deference aside, NDDOH's determination should also be upheld because *it is correct*. For over 20 years, EPA has repeatedly issued guidance stating that any activity before the "first hopper," or its equivalent, of a CPPP is not "in" a CPPP. Any activity before the "first hopper"—like the coal pile here—is therefore not subject to Subpart Y. *See* 40 C.F.R. § 60.250(a).

Although the Voigts cited EPA guidance in their briefs below, and the district court carefully parsed that same guidance in its 96-page decision, the Voigts now ignore EPA guidance altogether. Instead, they rely entirely on language from Subpart Y to argue that it applies to any "open storage pile" that is not "at the mine face," including CCMC's coal pile here. In essence, the Voigts argue that the CPPP

begins immediately after the mine face, and therefore the coal pile must be part of the CPPP.

This oversimplistic argument fails for two reasons. First, while it is true that Subpart Y applies to *some* coal piles, a coal pile must be "*in*" a CPPP for Subpart Y to apply. *See* 40 C.F.R. § 60.250(a). Second, while it is also true that "equipment located at the mine face" is excluded from Subpart Y, EPA has never stated that *only* equipment at the mine face is excluded, or that everything else is included. Rather, EPA issued specific guidance that defines the boundaries of a CPPP, identifies what is "in" a CPPP, and definitively demonstrates that CCMC's coal pile is outside of the CPPP.

Unable to show, as they must, that the coal pile is "in" the CPPP, the Voigts rely on a Third Circuit case to argue that the coal pile is "adjacent" and "integral" to the CPPP, and thus must be covered by Subpart Y. In fact, the Third Circuit case actually says that whether something is "adjacent" or "integral" to a covered facility is immaterial to the determination whether it, too, is covered. Rather, NSPS provisions apply only to equipment and operations "in" a covered facility.

With the coal pile excluded from Subpart Y, NDDOH properly issued CCMC a minor source permit because the Mine's PTE does not exceed 250 tpy. ADD-82. The Voigts do not dispute this on appeal, nor can they. As the district court explained, even if the Voigts' "experts' estimates are accepted with respect to the

disputed emission points," they would still be "unable to prove that the 250 tpy threshold has been reached so long as the PTE emissions from the coal pile and the haul road are not considered." *Id.* In other words, without including PTE from bulldozer operations and wind erosion from the coal pile, the Voigts cannot show that PTE from the Mine exceeds the 250 tpy threshold required for a major permit.

For these reasons, the Court should affirm the judgment of the district court.

STANDARD OF REVIEW

When reviewing a district court's grant of summary judgment, this Court reviews "legal conclusions de novo and its fact findings for clear error, considering the evidence in the light most favorable to the nonmoving party." *Fagnan v. City of Lino Lakes, Minn.*, 745 F.3d 318, 322 (8th Cir. 2014); *Deal v. Consumer Programs, Inc.*, 470 F.3d 1225, 1229 (8th Cir. 2006). This Court should affirm the district court if there is any basis in the record to do so, "even if that reason is different from the rationale of the district court." *Wierman v. Casey's General Stores*, 638 F.3d 984, 1002 (8th Cir. 2011).

ARGUMENT

I. EPA DELEGATED AUTHORITY TO NDDOH TO MAKE NSPS DETERMINATIONS; THEREFORE, NDDOH'S CONCLUSION THAT SUBPART Y DOES NOT APPLY TO THE COAL PILE SHOULD NOT BE DISTURBED.

EPA expressly delegated its authority to NDDOH to make the determination whether Subpart Y applies to the coal pile, and this Court should not disturb

NDDOH's determination. The Voigts' request that this Court overrule NDDOH's determination ignores (1) the role of the states in the cooperative federalism structure that is the foundation of the CAA; (2) the express delegation of authority from EPA to NDDOH to make the determinations that the Voigts question; and (3) caselaw cautioning against disturbing state agency determinations in similar circumstances.

A. States Play a Critical Role in Administering the Clean Air Act.

Congress enacted the CAA Amendments of 1970 "to guarantee the prompt attainment and maintenance of specified air quality standards." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 469 (2004) (internal quotation omitted). To achieve this goal, EPA devises National Ambient Air Quality Standards ("NAAQS") limiting various pollutants, which the States are obliged to implement and enforce. *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 566 (2007). To help states achieve NAAQS, EPA has to develop "technology-based performance standards"—the NSPS—to limit emissions from major new sources of pollution. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 846 (1984); *see* 42 U.S.C. § 7411(b) (2006). In addition to achieving the NAAQS, the CAA requires states to adopt a permit requirement for the construction of major sources to prevent deterioration of air quality (PSD) that is satisfactory. 42 U.S.C. § 7475(a)(1).

The CAA declares that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). This statutory direction underlies what courts have termed "the CAA's 'core principle' of cooperative federalism." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 134 S. Ct. 1584, 1602 n.14 (2014). North Dakota has achieved "attainment" status for all pollutants, meaning that there are no regions within the State that fail to satisfy the NAAQS.[4]

This Court recognizes the importance of the CAA's cooperative federalism principles in understanding the proper role of the states. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 971 (8th Cir. 2014). In practice, these principles mean that states develop regulations to implement CAA programs, subject to review and approval by EPA. After EPA approves the relevant state regulations, "the state has primary responsibility for implementing federal air quality planning goals." *United States v. Minnkota Power Corp., Inc.*, 831 F. Supp. 2d 1109, 1113 (D.N.D. 2011).

And that is exactly what happened here. NDDOH has rules that incorporate the federal PSD requirements by reference, N.D. Admin. Code § 33-15-15-01.2, and

[4] Map of Counties Designated "Nonattainment" for CAA's NAAQS, https://www3.epa.gov/airquality/greenbook/map/mapnmpoll.pdf (last visited Oct. 30, 2018).

then go further by requiring construction permits for minor sources that do not exceed the major source threshold by having a PTE of 250 tons or more per year of a regulated pollutant, such as PM. *See generally* N.D. Admin. Code §§ 33-15-14-01 through 33-15-14-07. Under these rules, NDDOH is responsible for reviewing air permit applications, and for determining whether an applicant should be issued a major or minor source permit. EPA reviewed and approved both permit programs, making them part of North Dakota's federally-approved SIP. *See* 40 C.F.R. pt. 52, Subpart JJ.

The Voigts' challenge to North Dakota's authority to interpret, implement, and enforce its EPA-approved regulations would undermine what this Court has called "the CAA's cooperative approach," under which "states issue the preconstruction permits in accordance with their SIPs and federal minimum standards." *Nucor Steel-Ark. v. Big River Steel, LLC*, 825 F.3d 444, 447 (8th Cir. 2016); *see also Del. Dep't of Natural Res. & Envtl. Control v. EPA*, 895 F.3d 90, 102 (D.C. Cir. 2018) ("[T]he Act is 'an exercise in cooperative federalism.'").

B. EPA Expressly Delegated and Approved NDDOH's Authority To Determine Subpart Y Applicability.

The Voigts ask the Court to ignore the permit decision by NDDOH because (1) CCMC did not obtain an NSPS applicability determination from EPA; and (2) EPA "does not delegate authority to the states to interpret the law, especially if

the state's interpretation would affect national consistency of the law." Aplts. Br. at 36-43. Both points are incorrect.

EPA has expressly delegated its authority to North Dakota to implement and enforce federal NSPS rules. *See Automatic Delegation of Authority to the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming To Implement and Enforce New Source Performance Standards*, 79 Fed. Reg. 60993, 60994 (Oct. 9, 2014)[5]; *see also* 42 U.S.C. § 7411(c) (allowing delegation by EPA to states). "Delegation confers primary responsibility for implementation and enforcement" of the NSPS on North Dakota. 79 Fed. Reg. at 60994. That includes the authority under 40 C.F.R. § 60.5 to make NSPS applicability determinations. *See US EPA Region 8 Delegation Summary, 40 CFR Part 60 – New Source Performance Standards* (May 19, 2017)[6] (authority under Subpart A delegated to North Dakota, including authority to make NSPS applicability determinations under 40 C.F.R. § 60.5); *see also Clean Air Act Approval and Promulgation of Air Quality Implementation Plan Revision for North Dakota*, 73 Fed. Reg. 30308, 30311 (May

[5] As a precondition to this delegation, North Dakota has incorporated the federal NSPS rules into its administrative code, by reference. *See* N.D.A.C. § 33-15-12-01.1.

[6] *Available at* https://www.epa.gov/sites/production/files/2014-03/documents/part60_nsps_delegation_region_8_summary_table_report_0.pdf (last visited Oct. 30, 2018).

27, 2008) (delegating "[d]eterminations of applicability, such as those specified in 40 CFR Part 60.5" to North Dakota).

The Voigts' argument that only U.S. EPA applicability determinations are entitled to deference is wrong. Aplts. Br. at 36-40 (citing cases). CCMC was not required to seek an applicability determination from EPA. *Id.* at 36-43. By applying for a construction permit, CCMC effectively sought an applicability determination from the agency authorized by EPA to make one—NDDOH. This Court has recognized as much in dismissing a previous CAA citizen suit that sought to challenge NSPS determinations made by a state in issuing construction and operating permits; there was no suggestion that the state lacked authority to do so. *See Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1020 (8th Cir. 2010).

Allowing NDDOH to make the determination about the applicability of Subpart Y to the coal pile does not "adversely affect national consistency of the law." Aplts. Br. at 42. First, NDDOH's decision is consistent with EPA's nationally-applicable guidance, as discussed in Section II of this brief. Second, states routinely interpret NSPS as a necessary part of state-administered CAA permit decisions. For example, in the context of fielding objections to state-issued Title V permits, EPA frequently reviews states' NSPS determinations without objecting to the states' ability individually to make these determinations in the first instance. *See, e.g.*, EPA, *Order Responding to Petitioners' Request That The Administrator Object to Issues*

of State Operating Permit, Petition Number V-2011-1 (July 23, 2012)[7] (denying objection to Title V permit issued by Wisconsin Department of Natural Resources alleging, in part, that the permit lacked appropriate NSPS requirements). If the Voigts were correct that individual state NSPS determinations "adversely affect national consistency," then states could not take any action in their fields of responsibility, and there would be no role for them in any CAA program. *See Del. Dep't of Natural Res. & Envtl. Control*, 895 F.3d at 102.

C. NDDOH's Subpart Y Determination Warrants Deference Unless the Agency Acted Arbitrarily or Unreasonably.

NDDOH was the proper authority to determine that Subpart Y does not apply to the coal pile. It conducted a formal review of CCMC's permit application, and created a record documenting its reasonable conclusions. An agency's interpretation of, or finding of facts under, a regulation that it is charged with enforcing is entitled to deference, because "[a]dministrative agencies are simply better suited than courts to engage in such a process." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 569 (1980); *see also* 3 Charles H. Koch, Jr., Administrative Law and Practice § 12.24[3] (2d ed. 1997) ("It is readily recognized that many conclusions reached by the agency are the result of a technical competence that even the most arrogant nonexpert could not hope to replicate.").

[7] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/koch_georgia_response2011.pdf (last visited Oct. 30, 2018).

This deference extends to an agency's application of its own regulations to a set of facts. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 283 (2009) ("[W]e do find that agency interpretation and agency application of the regulations are instructive and to the point.") (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Deference is accorded not only to a federal agency administering a federal program, but also to a state agency administering a federal program. *Minnkota*, 831 F. Supp. 2d at 1119-20 (deferring to NDDOH determination under CAA); *see also United States v. Alcoa, Inc.*, No. A-03-CA-222-SS, 2007 WL 5272187, at *7 (W.D. Tex. Mar. 14, 2007), *aff'd*, 533 F.3d 278 (5th Cir. 2008) ("Absent some showing that this decision violates federal environmental standards, the state agency's independent determination is entitled to some deference from this Court.").

In North Dakota, determinations by state agencies are presumptively correct and valid and deference is owed to decisions of state agencies if the agency used its expertise to develop a reasonable interpretation of a regulation. *See Hanson v. Indus. Comm'n*, 466 N.W.2d 587, 590-91 (N.D. 1991). As the North Dakota Supreme Court recently explained:

> [A]n administrative agency's reasonable interpretation of a regulation is entitled to deference … Courts generally defer to an agency's reasonable interpretation when the language is so technical that only a specialized agency has the experience and expertise to understand it or when the language is ambiguous … An agency has a reasonable range of discretion to interpret and apply its own regulations, and the agency's expertise is entitled to deference when the subject matter is complex.

Voigt v. N.D. Pub. Serv. Comm'n, 892 N.W.2d 149, 160-61 (N.D. 2017) (internal citations omitted). *Minnkota* similarly emphasizes that the scope of review of NDDOH decisions is "narrow" and that "absent a showing of arbitrary action," a court must assume that the agency exercised its discretion appropriately. 831 F. Supp. 2d at 1120. NDDOH's decisions underlying the type of permit it would issue for the Mine involved technical determinations or interpretations that were within NDDOH's unique sphere of expertise, and they should not be disturbed.[8]

These principles compel deference to a state agency determination that is challenged in a Clean Air Act citizen suit against a source that relied on the

[8] This Court's decisions refusing to exercise jurisdiction over CAA citizen suits that collaterally attack state-issued major source operating permits, while not exactly on point, also counsel against disturbing the Minor Permit in the absence of arbitrary action by NDDOH. *See Nucor*, 825 F.3d at 451; *Sierra Club*, 615 F.3d at 1019. It is true that the EPA-approved minor source permit rules for North Dakota do not require public notice of draft permits, but that fact does not make all of NDDOH's minor permits arbitrary. *See* 40 C.F.R. § 52.1820(c). Many state minor construction permit programs approved by EPA do not afford an opportunity for comment. *See e.g.*, *Luminant Generation Co., LLC v. U.S. EPA*, 675 F.3d 917, 922 (5th Cir. 2012) (flexibility in state design of EPA-approved minor source permit program); *Citizens Against Multi-Chem v. La. Dep't of Envtl. Quality*, 145 So. 3d 471, 477 (La. Ct. App. 2014) (no public comment required in Louisiana).

determination. *See Nw. Envtl. Defense Ctr. v. Cascade Kelly Holdings LLC*, 155 F. Supp. 3d 1100 (D. Or. 2015). In *Cascade Kelly*, the plaintiffs argued that the defendant had improperly constructed a crude oil transloading terminal without first obtaining a major source permit under the PSD program. As part of the permitting process, the relevant state agency, like the NDDOH here, determined that the terminal had a PTE that was less than the applicable major source threshold. In ruling against the plaintiffs, the court noted that it was required to defer to the agency's determinations regarding potential emissions given that it was "a state agency charged with implementing a federal statute that has made technical determinations within its area of expertise." *Cascade Kelly*, 155 F. Supp. 3d at 1125-26; *see also Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351, 354, 357 (8th Cir. 1998) (giving "considerable deference" to a state agency's enforcement determinations).

Likewise, in *Grand Canyon Trust v. Energy Fuels Resources (U.S.A.) Inc.*, 269 F. Supp. 3d 1173 (D. Utah 2017), a CAA citizen suit, the court deferred to a determination that the defendant received from Utah's Department of Air Quality ("DAQ") that a uranium mill tailings management system satisfied the radon emissions standards set forth in 40 C.F.R. pt. 61, Subpart W. *Id.* at 1183; *see* ADD-53-54. The court explained that the Supreme Court has instructed that "while the EPA serves a 'limited but vital role in enforcing [CAA standards],' the statutory

'scheme … places primary responsibilities and authority with the States, backed by the Federal Government.'" *Id.* at 1196 (quoting *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 491). The court then deferred to DAQ's determination that an evaporation pond was not an "operational tailings impoundment" within the meaning of Subpart W because (1) EPA expressly delegated "its authority for the implementation and enforcement of" Subpart W to DAQ, (2) DAQ's determination interpreted the rules in a way that was "not inconsistent with federal law," and (3) "DAQ's interpretation [wa]s reasonable." *Id.* at 1196-97. Thus, "the court defer[red] to DAQ's expertise" and upheld its determination with respect to the evaporation pond. *Id.* at 1198. This Court should likewise defer to NDDOH.

D. NDDOH Did Not Act Arbitrarily or Unreasonably.

NDDOH is entitled to deference here for the reasons presented in *Grand Canyon* and *Cascade Kelly*: EPA delegated to North Dakota the authority to implement and enforce Subpart Y; NDDOH's conclusion about the coal pile is consistent with EPA regulations and guidance; and NDDOH's interpretation is reasonable. Indeed, the district court specifically found that NDDOH's determination to exclude the coal pile has a "plausible basis" in EPA policy and guidance, and "is not such an arbitrary or unreasonable result that this could not have been what EPA contemplated." ADD-74, ADD-76. Since "a court may not substitute its own interpretation for the agency's if the agency's interpretation is

reasonable," this Court should not disturb NDDOH's permitting decision. *Grand Canyon Trust*, 269 F. Supp. 3d at 1195 (quoting *Ritter v. Cecil Cty. Office of Housing & Cmty. Dev.*, 33 F.3d 323, 328 (4th Cir. 1994)); *see also Minnkota*, 831 F. Supp. 2d at 1121-31 (sustaining Clean Air Act determinations by NDDOH because they were "not unreasonable" and noting that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive").

NDDOH established a contemporaneous record of its decision to issue the Minor Permit, which shows that it gave CCMC's Permit Application "careful consideration" and made rational determinations that are "consistent" with EPA requirements. ADD-56. Several documents in the record show NDDOH's decision-making process, including CCMC's Permit Application, communications between NDDOH and CCMC, a draft Minor Permit, the Minor Permit, and NDDOH's AQEA. *See* JA-33 (Permit App.); JA-1057 (Draft Minor Permit); JA-60 (Minor Permit); JA-623 (AQEA); JA-631 (Emails Between CCMC and NDDOH)[9]; *see also*

[9] These documents refute the argument that NDDOH "did not give any indication in its written permit record as to how or why it arrived at its final permitting decision." Aplts. Br. at 44. In addition to these documents, NDDOH responded to an open records request for all records relating to the Minor Permit with 1,260 pages of documents relating to NDDOH's determination, which are also part of the administrative record. *See* JA-1149 (CCMC RFP Responses); *see also, e.g.*, JA-643 (Single Source Determination); JA-513 (Photos from CCMC to NDDOH); JA-461 (Inspection Report); JA-80 (England Letter to EPA); JA-78

ADD-59. For example, in the AQEA, NDDOH distinguished between "coal processing equipment" and other areas of the mine, including the "open coal storage pile," and noted that fugitive emissions from the latter "are not considered when determining major source applicability." JA-625 (AQEA). NDDOH thus recognized both the areas that are subject to Subpart Y, and the areas that are not. The Court should uphold the NDDOH's determination as long as the agency's path "may reasonably be discerned." *See Minnkota*, 831 F. Supp. 2d at 1120; *Grand Canyon Trust*, 269 F. Supp. 3d at 1195-96.

Contrary to the Voigts' argument that CCMC was the only entity that undertook an "analysis of Subpart Y applicability," Aplts. Br. at 17, NDDOH employees have testified that they undertook their own analysis of EPA regulations and guidance to determine that Subpart Y does not apply to the coal pile. JA-536, JA-555 (Thorstenson Dep. 22:1-5; 96:13-97:13). Indeed, the district court noted that after one of NDDOH's engineers received a response from CCMC stating that the coal pile falls outside of the CPPP, "he reviewed the guidance referenced [by CCMC] and concluded the coal storage pile was not subject to Subpart Y." ADD-71. The district court also acknowledged the same engineer's testimony that "he still believed the coal pile is not subject to Subpart Y based upon the EPA guidance

(NDDOH Letter to EPA); JA-1120 (Emails Between CCMC and NDDOH); JA-1125 (Draft Permit to Operate); JA-499 (Operating Permit).

referenced in [NDDOH's] letter to [EPA]." ADD-72. NDDOH did not just blindly adopt CCMC's NSPS applicability analysis, but undertook its own. *See* ADD-71-72.

And here, both NDDOH and EPA *received actual notice* of the Voigts' objections to the Minor Permit before the coal processing facility began to operate, and took no action to re-open the permit. The Voigts wrote to EPA on December 9, 2015 and presented their objections to the Minor Permit. JA-80-84 (England Letter to EPA). EPA conducted a conference call with NDDOH, and NDDOH followed up with a letter to EPA explaining why it issued the Minor Permit. *See* JA-547 (Thorstenson Dep. 63:13-64:3); JA-79 (NDDOH Letter to EPA). In that letter, NDDOH quoted EPA's 2009 Response to Comments, which stated, "The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of Subpart Y." JA-79 (NDDOH Letter to EPA). EPA did not object to the Minor Permit and did not communicate further with the parties. JA-547 (Thorstenson Dep. 64:4-7). By virtue of the Voigts' phone call and letter to EPA, EPA conducted the oversight review that the Voigts allege has not occurred.

NDDOH is the proper agency to determine whether Subpart Y applies to the coal pile and other areas at the Mine. NDDOH performed an independent analysis, which is evident from the record, and reasonably concluded that Subpart Y does not

apply to anything before the apron feeder. A reviewing court should defer to that decision.

II. EPA'S GUIDANCE IS CLEAR AND UNAMBIGUOUS—CCMC'S COAL PILE IS NOT "IN" THE CPPP AND THUS IS NOT COVERED BY SUBPART Y.

Deference aside, this Court should also refuse to disturb NDDOH's determination because NDDOH correctly applied the relevant EPA rules and guidance. To issue the Minor Permit, NDDOH had to determine whether the Mine's PTE exceeded the 250 tpy major source threshold. CAA major source determinations are based only on "direct[]" emissions, except where EPA has expressly determined by rule that fugitive emissions should be considered. 42 U.S.C. § 7602(j). Fugitive emissions are those that could not "reasonably pass through a stack, chimney, vent, or other functionally equivalent opening," while direct emissions could. 40 C.F.R. § 52.21(b)(20). As a result, PSD rules generally do not address fugitive emissions except from specific, or "listed," source categories such as Subpart Y.

A. Subpart Y Applies Only to Affected Facilities *In* CPPPs.

To determine whether the Mine is a major source, it was necessary for NDDOH to identify the boundaries of the CPPP regulated under Subpart Y, because only fugitive emissions from equipment covered by Subpart Y count toward major source thresholds for the Mine. *See Letter from C. Newton, Acting Director of EPA's*

Air and Radiation Division, to J. McCabe, Assistant Commissioner of the Indiana Department of Environmental Management at 1 (March 6, 2003)[10] (hereinafter, "2003 EPA Guidance"). As the district court explained, EPA made a considered policy choice to exclude fugitive emissions from coal mines for the purpose of determining whether mines are major sources. *See* ADD-9-10. Specifically, "EPA concluded that the costs of requiring fugitive emissions from coal mines to be counted were in excess of the potential benefits, particularly after considering that fugitive dust emissions were already subject to regulation by the Department of Interior under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. ch. 25." *Id.* Given this policy decision, it is critical to determine whether any fugitive emissions are from the mine or from the CPPP.

By its plain language, Subpart Y applies to "affected facilities *in* coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day." 40 C.F.R. § 60.250(a) (emphasis added). The "affected facilities" for Subpart Y are "[t]hermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles" that commenced construction, reconstruction or modification after May 27,

[10] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/20030306.pdf (last visited Oct. 30, 2018).

2009. 40 C.F.R. § 60.250(d).[11] Equipment located at the mine face "is not considered to be part of the CPPP." 40 C.F.R. § 60.250(f).

Although Subpart Y lists these "affected facilities," the Subpart is clear that it only applies to those facilities if they are located "*in*" a qualifying CPPP. 40 C.F.R. § 60.250(a). In other words, Subpart Y does not apply to "thermal dryers" or "open storage piles" that are located *outside* of a CPPP. Only fugitive emissions from affected sources like "transfer and loading systems" or "open storage piles" located *in* a CPPP are counted toward the major source threshold because only they are regulated under Subpart Y. *See* 2003 EPA Guidance.

B. EPA Has Repeatedly Stated That a CPPP Begins "At the First Hopper," Or Its Equivalent.

EPA has repeatedly defined what is "in" and what is "outside" of a CPPP. Under EPA's definition, neither CCMC's coal pile, nor unloading to it, is "in" the CPPP.

In the 1998 EPA Guidance, EPA explained that "coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y." 1998 EPA Guidance, 63 Fed. Reg. at 53289. Further, the 1998 EPA Guidance stated that "coal unloading to plant machinery" is regulated by

[11] It is common for NSPS to apply only to discrete parts of a larger facility. For example, 40 C.F.R. pt. 60, Subpart D, which covers coal fired power plants, applies only to emissions from the combustion of "fossil fuel" or "wood residue" in the boiler. *See* 40 C.F.R. §§ 60.40(a), 60.41.

Subpart Y, but that coal "unloaded for the purpose of storage … is not an affected facility under NSPS Subpart Y."[12] *Id.*

In amending Subpart Y in 2009, EPA reiterated this longstanding interpretation regarding the boundaries of a Subpart Y facility. *Standards of Performance for Coal Preparation and Processing Plants*, 74 Fed. Reg. 51950 (Oct. 8, 2009) (hereinafter, "2009 Amendments"). It noted that its 1998 Guidance "has not been changed in the intervening years and, thus, remains in effect." JA-202 (Response to Comments). In responding to comments on the proposed 2009 Amendments, EPA again stated that "coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of Subpart Y." *See id.* And EPA again made clear that it "interprets the 'beginning' of the 'coal preparation plant' to be the first hopper (i.e., 'drop point') for receipt of coal from any form of transportation." JA-183, JA-202-03, JA-207-08 (Response to Comments). EPA has thus consistently stated for over 20 years that anything before the initial "hopper," or its equivalent, is not part of a Subpart Y facility.

[12] Although EPA stated in 1998 that unloading for "temporary storage" might be covered by Subpart Y, 1998 EPA Guidance, 63 Fed. Reg. at 53290, the coal pile here does not provide "temporary storage." Instead, as explained *infra* Section II.C.2, the coal pile provides long-term storage so that CCMC could meet its contractual obligations in the case of an emergency. The district court so found. ADD-24-26.

EPA has also specifically stated that "any haul roads between the 'active mining area' and the first hopper of the 'coal preparation plant' would not be subject to Subpart Y," and that "EPA's intent under this action was only to cover operations on the premises of the coal preparation and processing plant and, thus, not roadways that lead to the first hopper[.]" JA-208, JA-220 (Response to Comments).

Similarly, in connection with finalizing the 2009 amendments to Subpart Y, EPA prepared a presentation for the United States Office of Management and Budget and again reiterated the boundaries of a Subpart Y facility. *See E-mail Correspondence from M. Johnson, USEPA to C. Higgins, Office of Management and Budget (OMB), August 26, 2009, Standards of Performance for CPPPs - Final Amendments Powerpoint*[13] (hereinafter, "2009 EPA Presentation"). One of the issues that EPA addressed was defining "where the coal prep plant begins and ends," which EPA stated is important for "coal prep plants [that] are co-located with a coal mine," like the CPPP here. 2009 EPA Presentation at 21. EPA again explained that

[13] *Available at* https://www.regulations.gov/ (enter Doc. ID EPA-HQ-OAR-2008-0260-0141) (last visited Oct. 30, 2018). Although this presentation remains in "draft" form, it is nevertheless in the docket for the 2009 Subpart Y amendments, and therefore can provide insight regarding EPA's intentions. *See, e.g.*, NSR Workshop Manual (DRAFT October 1990), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf (last visited Oct. 30, 2018); *see also Powder River Basin Res. Council v. Wyo. Dep't of Envtl. Quality*, 226 P.3d 809, 817 n.4 (Wyo. 2010) (indicating that although the NSR Workshop Manual was never finalized, "it is widely recognized as an authoritative source on air quality regulation").

the "plant boundary begins at the *first hopper (i.e., 'drop point')* used to unload coal from any method of conveyance (i.e., truck, train, barge, coal pile)." *Id.* (emphasis added). Thus, EPA again interpreted Subpart Y as beginning at the first hopper—and not at any point before it. In all of this guidance, EPA does provide "a clear answer" to the boundaries of CCMC's CPPP. *But see* ADD-51.

EPA's statement that the "plant boundary begins at the first hopper (*i.e., drop point*)" does not mean that "drop point" has independent significance. ADD-43 (quoting 2009 Amendments, 74 Fed. Reg. at 51952 (emphasis added)). With this use of "i.e.," which means "[t]hat is," EPA simply indicated that a hopper can also be called a drop point. BLACK'S LAW DICTIONARY (10th ed. 2014). Not every drop point marks the beginning of a CPPP—only a hopper does. A hopper is "receiving equipment." *See* JA-203 (Response to Comments). CCMC's coal pile is not a hopper because it is not "equipment." *See infra* Section II.C.2. CCMC's coal pile is not in the CPPP, because it is located before the first "hopper"—which, in this instance, is the apron feeder.

The Voigts' arguments that the coal pile "is connected (both physically and operationally) to the structure containing the apron feeder as it extends into the coal pile" and "provides the platform for the unloading of coal into it" have no legal significance. ADD-43. Physical or operational "connectedness" is not the test to determine the boundaries of a CPPP. Indeed, under this reasoning, if the coal pile

were part of the CPPP, the haul road would also be part of the CPPP, because it is physically and operationally "connected" to the coal pile. But, as the district court found, EPA has excluded haul roads from Subpart Y. *See* ADD-50. Whether the coal pile is "in" the CPPP, as defined by EPA, is the only relevant inquiry—whether it is "connected" or proximate to the CPPP is not. *See* 40 C.F.R. § 60.250(a).

C. EPA Regulations and Guidance Show That The Coal Pile Is Not Subject to Subpart Y.

Based on EPA's first "hopper" boundary, CCMC's coal pile (and unloading to it) is not subject to Subpart Y.

1. The Apron Feeder Is The Boundary of the CPPP.

The coal pile is not "in" the Subpart Y facility because it is located before the first drop point for coal entering into the processing plant's machinery. *See* 2009 EPA Presentation at 21; JA-203 (Response to Comments). At the Mine, the apron feeder is the first piece of machinery that moves coal directly into crushing equipment. As explained in CCMC's Permit Application, coal "enters" the processing facility at the "receiving pocket and apron feeder." JA-36 (Permit App.). "This receiving pocket constitutes the beginning of the coal preparation plant subject to Subpart Y in accordance with EPA's interpretation." JA-43 (Permit App.).

The apron feeder at the Mine functions as a hopper—it receives coal, and feeds it into the crushing machinery. Indeed, the manufacturer of CCMC's apron

feeder specifically calls the apron feeder a "hopper." Joy Global[14] manufactured the apron feeder, which is a "surface feeder breaker" or "SFB" model 41. "The Feeder-Breaker design is such that the material is loaded *into a hopper* at the intake (receiving) end of the machine. The material is held *in the intake hopper* as it is being conveyed through the pick breaker, which sizes the material by the force of the sharp pointed picks[.]" *See* JA-910 (Joy Global Manual) (emphasis added)). The manufacturer also states that the machinery is designed such that a "haulage vehicle can discharge directly *into the robust feeder hopper*." *See* Joy SFB-41, https://mining.komatsu/product-details/sfb-41 (last visited Oct. 30, 2018) (emphasis added). NDDOH, too, correctly characterizes the apron feeder as a hopper. *See* ECF 92 (Br. of *Amicus Curiae* State of N.D.).

The manufacturer's description of the apron feeder confirms that it is the CPPP "boundary" because it is the first "drop point" used "to unload coal from any method of conveyance (i.e., truck, train, barge, coal pile)." 2009 EPA Presentation at 21. As the district court found, the coal pile is situated before the apron feeder. ADD-17 (including diagram). Therefore, based on EPA's clear guidance, the apron

[14] Komatsu has since acquired Joy Global. *See* Press Release, *Komatsu acquires Joy Global to expand mining business* (Apr. 5, 2017), https://www.komatsuamerica.com/our-company/press-releases/2017-04-05-komatsu-acquires-joy-global (last visited Oct. 30, 2018).

feeder is the boundary for the Subpart Y facility. Anything prior to the apron feeder, including the coal pile and any unloading to it, is not subject to Subpart Y.

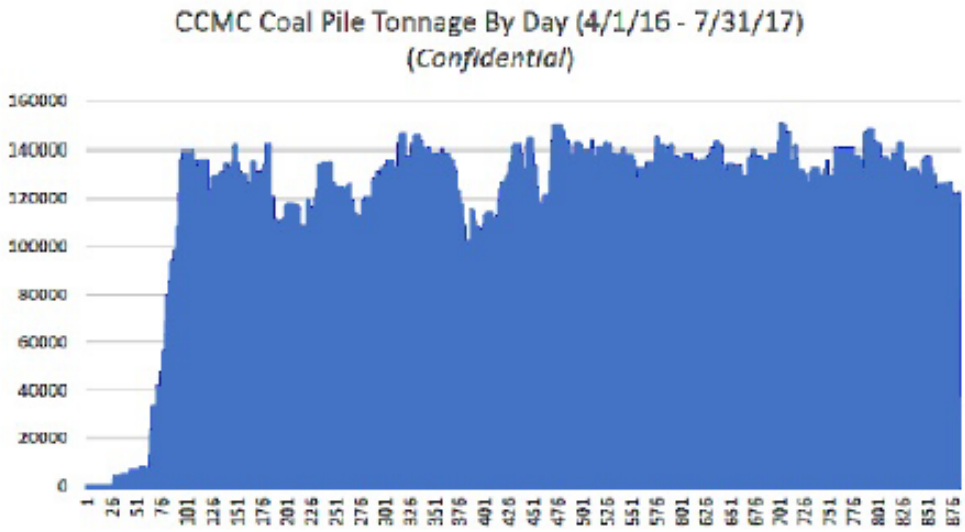
2. Coal Is Unloaded Onto the Pile for Storage.

The 1998 EPA Guidance further demonstrates that the coal pile is not regulated by Subpart Y because it does not involve "coal unloading to plant machinery" but instead contains coal "unloaded for the purpose of storage." 63 Fed. Reg. at 53289; JA-202 (Response to Comments).

The 1998 EPA Guidance requires "unloading to plant machinery" for the beginning of regulated Subpart Y activities. Unlike the apron feeder and crushers, a coal pile could not reasonably be characterized as "plant machinery" or "equipment." The definition of "[o]pen storage pile" in Subpart Y distinguishes between a pile, and "equipment" used upon the pile. 40 C.F.R. § 60.251(m). And in connection with the 2009 Subpart Y amendments, EPA explained that a coal pile is an "apparatus" because it is "a group or aggregate of materials"—in contrast to other possible definitions of "apparatus," including an "instrument or machine." JA-204 (Response to Comments). EPA has never characterized a coal pile as machinery or equipment, and the common understanding of those terms would not encompass coal piles.

Even if coal unloaded for purposes of "temporary storage"—in contrast to unloading for more long-term storage—is subject to Subpart Y, the district court

correctly found that the coal pile serves a more long-term storage function than "temporary storage." ADD-24-26. As the court noted, the plaintiffs themselves submitted a graph showing the fluctuations of the coal pile's inventory level, which demonstrates that roughly two-thirds of the inventory (at least in terms of quantities of coal) during the time frame considered was unaffected by daily operations. *See* ADD-25.



Thus, the "bulk of the coal … in the pile" is in place for a longer time than would be considered "temporary storage." *Id.*

Indeed, the district court correctly concluded that most of the coal on the approximately 8-acre pile,[15] which has never held less than 101,000 tons since it was

[15] The district court also observed that in a memorandum prepared for the 2009 rule-making for the amendments to Subpart Y, EPA differentiated between "short-term" and "long-term" coal piles. *See* ADD-37 n.6 (citing *Model Plant Control Costing Estimates for Units Subject to the NSPS for Coal Preparation*

constructed, is stockpiled as a reserve to be used in case of emergencies. ADD-24-26; JA-416 (Steffen Decl. ¶ 17). NDDOH's Facility Inspection Report noted that the pile is designed to hold an approximate "3-week supply" of coal for unexpected supply interruptions. JA-465 (Report); JA-416 (Steffen Decl. ¶ 18). "These points have not reasonably been controverted by [the Voigts]." ADD-25.

Consistent with the 1998 EPA Guidance, coal is unloaded at CCMC's coal pile for purposes of storage, and the coal pile—and unloading to it—are not regulated under Subpart Y. NDDOH correctly concluded that coal is unloaded "directly onto the pile for the purpose of storage" and therefore the pile "is not considered an affected facility under NSPS Subpart Y." JA-496 (Report).

D. The Voigts Ignore EPA Guidance About Where a Coal Preparation and Processing Facility Begins.

On appeal, the Voigts ignore all of the relevant EPA guidance. Instead, the Voigts now argue that the "plain language" of Subpart Y covers CCMC's coal pile, without discussing EPA guidance on where a CPPP begins. Next, the Voigts argue, in effect, that because the coal pile is adjacent and "integral" to the coal preparation and processing facility, it must be covered by Subpart Y. Each argument fails.

Plants (40 C.F.R. Part 60, Subpart Y) (Memo to Coal Preparation Docket EPA-HG-QAR-2008-0260 by Christian Fellner, April 2008) (JA-86-100)). In that memorandum, all of the coal piles described by EPA as short-term were 0.5 acres or less and those described as long-term were more than an acre in size. Here, CCMC's coal pile covers approximately 8 acres.

1. The Voigts' "Plain Language" Arguments Ignore the Rule's Language and Clear EPA Guidance.

The Voigts present "plain language" regulatory arguments in an attempt to show that CCMC's coal pile is subject to Subpart Y. Aplts. Br. at 29-33. In doing so, the Voigts ignore the plain language of Subpart Y that makes it applicable only to facilities "*in*" a CPPP.

For example, the Voigts argue that Subpart Y's definition of an "open storage pile" includes the phrase "any facility," thus Subpart Y applies to "any" coal pile wherever it is located. Aplts. Br. at 30 (citing 40 C.F.R. § 60.251(m)). Similarly, the Voigts argue that Subpart Y applies "broadly" to "equipment used in the loading, unloading, and conveying operations" of open storage piles. *Id.* (citing 40 C.F.R. § 60.254(c)).

The use of the word "any" in the Subpart Y definition of "coal pile" does not eliminate the requirement that the coal pile be *in* a CPPP, or mean that every coal pile, no matter its location, is part of a Subpart Y facility. The definitions cited by the Voigts simply do not apply to CCMC's coal pile, because it is located *outside* of a CPPP.

The Voigts cite Subpart Y's language that "[e]quipment located at the mine face" is not part of the Subpart Y facility, but then leap to the conclusion that CCMC's coal pile must be subject to Subpart Y since it is located "three-to-four miles" away from the mine face. Aplts. Br. at 32-33 (citing 40 C.F.R. § 60.251(f)).

While it is true that equipment at the mine face is expressly excluded from Subpart Y, *see* 40 C.F.R. § 60.251(f), EPA has never stated that everything away from the mine face is included. To the contrary, EPA has also excluded haul roads after the mine face from Subpart Y, as the district court found. *See* ADD-50. Thus, an affected facility does not fall under Subpart Y just because it is away from the mine face; instead, it falls under Subpart Y only if it is "*in*" the CPPP. 40 C.F.R. § 60.250(a) (emphasis added).

2. The Proximity of the Coal Pile to the CPPP Does Not Determine Whether Subpart Y Applies.

Unable to show, as they must, that CCMC's coal pile is "in" a coal preparation and processing facility, the Voigts argue, in effect, that the coal pile is subject to Subpart Y because it is adjacent to the CPPP. Aplts. Br. at 34-37. But proximity is not the pertinent standard.

The Voigts assert that because the coal pile sits on a common "pad" with the CPPP away from the mine face, it is "co-located" with the CPPP, and should be considered part of it. Aplts. Br. at 35-36. This "pad" is just an area that was graded by an earthwork contractor—different from the contractor that built the CPPP. JA-998 (Steffen Decl. ¶ 6). The CPPP contractor was not provided with instructions as to grading the area identified as the "pad" because the construction of the crushing and conveying equipment was carried out within a much smaller footprint. *Id.* The "pad" has no regulatory significance. Indeed, Plaintiffs cite no legal authority for

their position that everything contained within a "pad" is regulated by Subpart Y, and there is none. EPA has never used information about the area of a "pad" to determine the boundaries of a coal preparation plant. Instead, EPA has consistently said that the "beginning of a coal preparation plant" is the "first hopper." JA-183, JA-203, JA-208 (Response to Comments).

The Voigts are wrong that "all depictions of the CPPP include the coal pile as part of the CPPP pad." Aplts. Br. at 15. In reality, all depictions of the "pad" include the area of the coal pile, but not all depictions of the CPPP include the pile. JA-840-41 (08/24/14 Color Draft Permit App. Appx. B) (showing pile separate from CPPP); JA-1723-24 (Mine Planning Documents) (same).

The Voigts actually demonstrate that the coal pile is not part of the CPPP when they explain that a bulldozer operator can use "remote-control equipment" in his cab to change the speed of crushing and conveying equipment. Aplts. Br. at 31. A bulldozer on the pile is indeed "remote"—or away from—the CPPP.

3. *Star Enterprise* Dismisses Functional Relationships and Proximity as Factors for Determining NSPS Applicability.

The Voigts' reliance on *Star Enterprise v. U.S. EPA*, 235 F.3d 139 (3d Cir. 2000), *as amended* (Feb. 20, 2001), to assert that the coal pile's functional relationship and proximity to the CPPP are relevant factors in determining whether Subpart Y applies to the coal pile, is misplaced. The case actually rejects both of those factors. Aplts. Br. at 34-35.

The issue in *Star Enterprise* was whether the CAA's NSPS for petroleum refineries could be applied to gas turbines located in a power plant "adjacent" to a refinery. EPA initially found that the turbines were subject to the NSPS for refineries because they were "integral" to the operation of the refinery, "adjacent" to it and under common control. *Star Enterprise*, 235 F.3d at 148-49. The Third Circuit rejected EPA's test, reasoning that these factors "cannot … provide the basis for concluding that the … gas turbines are subject to regulation under Subpart J." *Id.* at 149.

The Third Circuit first rejected EPA's adjacency test. It explained that if adjacency alone were sufficient to make a separate facility part of the refinery in question, "any independent, free-standing facility … built on land adjacent to [the] petroleum refinery" would be "part of" the refinery. *Id.* For example, this test would "establish that a McDonald's restaurant … built on land adjacent to [the] petroleum refinery for the convenience of refinery workers" is part of the "adjacent petroleum refinery." *Id.* Thus, "EPA would be able to regulate, under Subpart J, fuel gas combustion devices *inside the McDonald's*" even though "these fuel gas combustion devices would not be located 'in' a 'petroleum refinery.'" *Id.*

The court also rejected EPA's conclusion that if a facility is "integral" to the petroleum refinery in question—or the refinery shares a "mutually beneficial relationship" with another facility—that facility is part of the refinery. *Id.* at 151.

Instead, the court held that "the touchstone of such a determination is the physical location of the facilities in question"—are they "in" a Subpart J or Subpart Y facility, or are they outside of it? *Id.*

Star Enterprise confirms that the boundary of the CPPP regulated by Subpart Y is determined by the regulation itself as interpreted by EPA and implemented by the NDDOH, and not by amorphous considerations of contiguousness, adjacency, common control or whether equipment is "integral" or "necessary." EPA itself has cited *Star Enterprise* on this point:

> EPA is mindful that in the *Star Enterprise* decision, the Third Circuit Court of Appeals held that NSPS Subpart J (pertaining to Petroleum Refineries) did not apply to two stationary gas turbines located in an electrical power plant complex, even though this complex was located adjacent to a petroleum refinery and the power plant had a contractual agreement to provide steam and electricity to the refinery. In the opinion, the court based its decision on the specific Subpart J definition of 'affected facility,' as it applied to the facts of the case, *rather than on the concepts of contiguousness, adjacency, or common control*.

See Applicability Determination Index Control No. 1000049 at 3 (September 17, 2010)[16] (emphasis added).

4. The Coal Pile Is Not Integral to the Operation of the Processing Plant.

Even if the "integral" test were valid, however, it would not be satisfied here. First, it is not always the case that the CPPP is run "primarily on top of the pile."

[16] *Available at* https://cfpub.epa.gov/adi/ (last visited Oct. 30, 2018).

Aplts. Br. at 31. Instead, CCMC's bulldozer operator explained that CCMC has two bulldozers, only one of which has a computer system. When the operators are using the smaller bulldozer (because, for example, the larger one is down for repairs), the crushing equipment is controlled entirely from a computer system located in the processing facility. *See* JA-1617 (Lounsbury Dep. 53:8-54:13). The bulldozer operator testified that the primary (rather than emergency) start/stop buttons for the crushers are within the building, and are not part of the computer in the bulldozer. *Id.* Furthermore, Coyote Station, not CCMC, starts and stops the conveyor belt. JA-1609 (Lounsbury Dep. 21:12-15).

The use of bulldozers on the coal pile to push coal onto the area above the apron feeder does not make the coal pile "integral" to the CPPP. Aplts. Br. at 31-32. During normal operation, the apron feeder is covered by the coal pile, which draws coal in without assistance from the bulldozer. JA-416 (Steffen Decl. ¶ 19). But even if coal were regularly pushed from the pile into the apron feeder or hopper, the "plant boundary begins at the first hopper (i.e., 'drop point')"—not at the pile. 2009 EPA Presentation at 21.

The Voigts also incorrectly claim that the district court found that "without the coal pile" the CPPP would have to be reconstructed to allow for coal loading into it. Aplts. Br. at 12, 35. This is not what the district court stated. Instead, the district court noted that "it is readily apparent" from the large size of the pile "that most of

the pile is not required" for "the loading of coal into the receiving structure for processing." ADD-26. Indeed, the court concluded that nothing required CCMC to locate "its coal storage pile at its present location." *Id.* The district court recognized that CCMC "could have placed it elsewhere" and then "conveyed the coal by truck or conveyor to the point where it would undergo crushing." *Id.* But keeping the current configuration, CCMC could "build a ramp to the apron feeder or possibly use a much smaller coal pile to facilitate loading." *Id.* Indeed, although the CPPP began operations on May 16, 2016, it took CCMC until August 2016 for the coal pile to reach the range of 130,000 to 145,000 tons. JA-415 (Steffen Decl. ¶¶ 10, 12). The CPPP thus successfully operated for nearly three months with a coal pile that was substantially smaller than its usual current size.

Even if the "integral" or "necessary" test were good law, CCMC's coal pile is neither "integral" nor "necessary" to the CPPP here.

III. NDDOH CORRECTLY DETERMINED THAT THE MINE IS NOT A MAJOR SOURCE.

With PTE estimates from the coal pile correctly excluded, emissions from the Mine are unquestionably less than the 250 tpy major source threshold. NDDOH determined that a major source permit was not required as a result, and the district court agreed. ADD-95. As the district court explained, "even if [the Voigts'] experts' estimates are accepted" with respect to the remaining disputed emission points, the Voigts "will be unable to prove that the 250 tpy threshold has been

reached." ADD-82. Indeed, counsel for the Voigts admitted at the hearing on the motions for summary judgment that their primary expert's calculation "would not reach 250 tons" if fugitive emissions from the coal pile were excluded. JA-1293-94 (MSJ Hearing Transcript). The Voigts do not dispute this point on appeal. Thus, NDDOH appropriately determined that the Mine was not a major source.[17]

IV. THE COAL PILE HAS A DUST CONTROL PLAN AS REQUIRED BY STATE RULES.

Both NDDOH and the district court are correct that Subpart Y does not apply to CCMC's coal pile, and that its existing dust control measures are therefore sufficient. *See* ADD-95-96. In developing Subpart Y, EPA had a clear understanding that it would not reach open storage piles prior to the coal preparation plant and that those storage piles would implement dust control through other regulatory programs. JA-211 (Response to Comments). That is the precise factual scenario here; it "was not EPA's intent to regulate" sources such as the Mine's coal pile. *Id.*

[17] Although all activities related to the coal pile are properly excluded from the major source calculation, *see supra* Section II, even if emissions from unloading at the pile, maintenance of the pile by bulldozer, and truck traffic through and around the pile were counted, the PTE would still remain under the 250 tpy major source threshold under any expert's calculations. *See* ADD-72-80 (showing that both parties' experts' calculations do not exceed 250 tpy unless wind erosion from the coal pile is counted toward the major source threshold).

The Minor Permit obligates CCMC to control fugitive dust by adhering to requirements in North Dakota Administrative Code Chapter 33-15-17. *See* JA-62 (Minor Permit). In addition to this NDDOH regulation, CCMC is also subject to regulations of the NDPSC, including the requirement to "specify the measures to comply with the air pollution control requirements of the state department of health and any other measures necessary to effectively control wind erosion and attendant air pollution." N.D.A.C. § 69-05.2-09-05. CCMC has prepared and is implementing a Dust Control Plan to comply with these requirements. *See* JA-416 (Steffen Decl. ¶¶ 20-22). Therefore, as the district court correctly concluded, CCMC has fulfilled its obligations with respect to fugitive dust control at the pile. ADD-95-96.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 31, 2018

Respectfully submitted,

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Dated: October 31, 2018

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I hereby certify that I filed electronically a version of the brief in searchable PDF format, pursuant to Circuit Rule 28A(h). I hereby certify that the file has been scanned for viruses and that it is virus-free.

Dated: October 31, 2018

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Counsel for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that, on October 31, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

s/ *Jeffery D. Ubersax*
Jeffery D. Ubersax

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